

Drafting Notes: Changes to Phosphorus Compliance Bill
LRB-3079/P2

1. Adaptive Management Provisions. 283.13(7). Two changes are made. The first is to broaden the use of adaptive management to include compliance with total suspended solids imposed through a total maximum daily load allocation. The second is to change the timetable so that there is a 20 year compliance period (four permit terms) for adaptive management to coincide a 20 year variance period in this bill.

2. Definitions. 283.16(1). Three key changes are made here. The definitions of “conventional control technology” and “minor source” are deleted and the definition of “major facility upgrade” is revised. This draft uses a unified concept of “major facility upgrade” to address two separate issues: eligibility for the variance and exceptions to the interim limits.

For the first, a permittee must certify that in order to comply with the water quality based effluent limit (WQBEL) for phosphorus it must undertake a major facility upgrade. For example, if a facility has a WQBEL of 0.075 mg/l and needs to install advanced filtration to meet the limit, it would qualify for the variance. Conversely if a permittee has a WQBEL of 0.5 mg/l and can meet that by adding chemical it would not qualify for this variance.

The same concept is now applied to the interim limits. Rather than provide exceptions from the interim limits based on the size of facility (minor facilities) or a type of technology (conventional control technology), this draft provides that if the permittee needs to make a major facility upgrade to meet the interim limit, that it need only comply with the last achievable interim limit. The other requirements of the variance (e.g. paying \$50/pound) would still remain in effect.

A For these purposes, major facility upgrade is defined as new treatment equipment *and* a new treatment process. There is also a reference to s. 283.22(3)(am) which is the authority for DNR to promulgate the technology standards in NR 217. This reference is there to ensure that if a facility needs to add equipment or treatment process to meet that technology standard, it would *not* qualify for this variance. The variance is only there for facilities that need to meet the new WQBEL.

The goal was to provide a more simplified and unified process for all permittees. These concepts will be noted further as they are applied in the following sections.

3. Initial Determination of Need for Variance. 283.16(2). Two important changes are made to this section. The first is to expressly require that the determination made by the Department of Administration is done in consultation with the Department of Natural Resources. The second is to require that the analysis focuses on those impacts associated

with facilities that need to make a major facility upgrade. The reference to minor sources is also removed.

4. Subsequent Review of Technology. 283.16(3). Two changes are made here as well. The first is to again require consultation with the DNR. The second is to reduce the time for review from 10 years to 5 years. This addresses in large part the drafting note submitted with the P2 draft. Five years was chosen because variances are typically issued for a full 5 year permit. In addition, a review every 3 years would result in a nearly continuous review cycle which seems unnecessary. References to minor sources have been removed.

5. Availability of the Variance. 283.16(4). Several changes are made here. First, this draft includes an eligibility requirement for the variance. The permittee must certify that it cannot meet the WQBEL without a major facility upgrade.

Second, per the drafters note, there is a time limit for requesting the modification to 60 days consistent with 283.15(2)(am). Per the drafter's note at p.7 ln 21, the last sentence of that section is removed.

Third, the criteria for approval are now simplified. The references to minor sources (p.8 ln 1-5) and for sources relying on conventional control technology (p. 8 ln 9-14) are deleted. The remaining criteria are modified to require the certification that a major facility upgrade is needed, and that the permittee will comply with the requirements of sub (6).

6. Variances for Minor Sources. 283.16(5). This section is deleted.

7. Variance Provisions – Interim limits. 283.16(6)(a). There are two major and independent components to the variance – interim limits and phosphorus reductions. There are three major clarifications to the interim limits.

First, this draft uses the term interim limits in the introductory paragraph to highlight this component of the variance.

Second, this draft eliminates all of the conventional technology “exceptions” to the interim limits. There is a new paragraph (b) providing a unified exception to the interim limits. If achievement of the interim limit cannot be attained without a major facility upgrade then it must maintain compliance with the last achievable interim limit . Compliance with the water quality based effluent limitation is required at the end of the fourth permit term.

Third, this draft eliminates reduces the variance timeframe from 25 years to 20 years. As a result the interim limit of 0.4 mg/l is eliminated and instead, at the end of the fourth

permit term, the WQBEL takes effect. In so doing, the interim limits in this section (0.8 mg/l; 0.6 mg/l and 0.5 mg/l) are consistent with the interim limits in NR 217.18 for adaptive management. In conjunction with the changes made to 283.13(7) noted above, the time frames for these two options will also be consistent.

8. Payments to Counties. 283.16(8). Several changes were made to make payments to counties more uniform and accountable.

First, the payments are now automatically paid to each county within the basin based on the percentage of land that the county has within the basin. This assures that a large point source at the edge of one county in the basin will not give a windfall to that county, but will provide funds to all of the counties within the basin based on their percentage of land within the basin.

Second the balance between use of the funds for cost share dollars and staff has been simplified so that 65% of the funds must be used for cost share dollars.

Third, a new provision directs the counties to use the cost share dollars to target those facilities or practices within the county that can provide the greatest phosphorus reductions.

Finally, the DNR has additional discretion to direct permittees to withhold payments in part or in whole from non-performing counties.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-3079/P2
RCT:cjs:jm

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT** *to amend* 283.63 (1) (am) and 283.63 (4); and *to create* 283.13 (7) and
2 283.16 of the statutes; **relating to:** phosphorus discharges to the waters of the
3 state and a statewide variance from the water quality standard for phosphorus
4 for certain dischargers.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

5 **SECTION 1.** 283.13 (7) of the statutes is created to read:

6 283.13 (7) COMPLIANCE WITH THE WATER QUALITY STANDARD FOR PHOSPHORUS[^] (a)

7 In this subsection, "adaptive management option" means an approach to achieving
8 compliance with a water quality standard adopted under s. 281.15 under which a
9 permittee implements a plan to achieve the water quality standard through[^]

And Total Suspended Solids.
or compliance with an approved total maximum daily load allocation for total suspended solids,
or load allocation

1 verifiable reductions in the amount of water pollution from point sources and
2 nonpoint sources, as defined in s. 281.16 (1) (e), in a basin or other area specified by
3 the department and uses monitoring data, modeling, and other appropriate
4 information to adjust the plan if needed to achieve compliance.

5 (b) If the department authorizes a permittee to use an adaptive management
6 option to achieve compliance with the water quality standard for phosphorus, ^{or an approved total maximum daily load for total suspended solids} the
7 department may specify a date under sub. (5) that provides ^{has until the end of the fourth permit term after adaptive management is first authorized} 5 permit terms for the
8 permittee to comply with its water quality based effluent limitation for phosphorus.

9 SECTION 2. 283.16 of the statutes is created to read:

10 **283.16 Statewide variance for phosphorus.** (1) DEFINITIONS. In this
11 section:

12 (a) "Basin" means the drainage area identified by an 8-digit hydrologic unit
13 code, as determined by the U.S. Geological Survey.

14 (b) "Category" means a class or category of point sources specified by the
15 department under s. 283.13 (1).

16 ~~(c) "Conventional control technology" means optimal use of a technology for~~
17 ~~controlling phosphorus discharges that is appropriate for a point source and that is~~
18 ~~most commonly used at point sources in the same category in the majority of states~~
19 ~~adjoining this state.~~

20 (d) "Existing source" means a point source that was covered by a permit on
21 December 1, 2010.

22 (e) "Major facility upgrade" means ^{the addition of new treatment equipment} ~~construction or installation, including~~
23 ~~and processes to provide for the removal of phosphorus below that required under s. 283.11 (3)(am).~~
24 ~~installation of a filtration system, for which the permittee must acquire a substantial~~
25 ~~Major facility upgrade does not include the optimization of existing equipment and processes.~~
~~amount of property or for which the permittee must develop an extensive~~
~~financing plan and obtain financing.~~

1 ~~(f) "Minor source" means a point source with a discharge from a treatment work~~
2 ~~that consists primarily of a stabilization pond system or a lagoon system or with a~~
3 ~~discharge of less than 100,000 gallons per day.~~

4 (g) "Nonpoint source" has the meaning given in s. 281.16 (1) (e).

5 (h) "Target value" means the number of pounds of phosphorus that would be
6 discharged from a point source during a year if the average concentration of
7 phosphorus in the effluent discharged by the point source during the year was 0.2
8 milligrams per liter.

9 (i) "Water quality based effluent limitation" means an effluent limitation under
10 s. 283.13 (5), including an effluent limitation based on a total maximum daily load
11 under 33 USC 1313 (d) (1) (C) approved by the federal environmental protection
12 agency.

13 (2) INITIAL DETERMINATION CONCERNING THE WATER QUALITY STANDARD FOR
14 PHOSPHORUS. *in consultation with the department of natural resources* (a) The department of administration_Λ shall determine whether
15 attaining the water quality standard for phosphorus, adopted under s. 281.15,
16 *that require a major facility upgrade* through compliance with water quality based effluent limitations_Λ is not feasible
17 because it would cause substantial and widespread adverse social and economic
18 impacts on a statewide basis.

19 (b) The department of administration shall include all of the following in its
20 determination under par. (a):

21 1. A calculation of the statewide cost of compliance with water quality based
22 effluent limitations for phosphorus_Λ *for those facilities requiring a major facility upgrade.*

23 2. A calculation of the statewide per household cost for water pollution control
24 by publicly owned treatment works, including the projected costs of compliance with

1 water quality based effluent limitations for phosphorus, and a calculation of the
2 percentage of median household income the per household cost represents.

3 ~~3. A calculation of the statewide cost for minor sources to comply with water~~
4 ~~quality based effluent limitations for phosphorus.~~

5 4. A determination of whether the cost of compliance with water quality based
6 effluent limitations for phosphorus would cause substantial adverse social and
7 economic impacts on a statewide basis.

8 5. A determination of whether the cost of compliance with water quality based
9 effluent limitations for phosphorus would cause widespread adverse social and
10 economic impacts on a statewide basis.

11 (c) The department of administration shall make a preliminary determination
12 under par. (a) no later than the 60th day after the effective date of this paragraph
13 [LRB inserts date]. The department of administration shall provide public notice,
14 through an electronic notification system that it establishes or selects, of its
15 preliminary determination and shall provide the opportunity for public comment on
16 the preliminary determination for at least 30 days following the public notice.

17 (d) The department of administration shall consider any public comments in
18 making its final determination under par. (a) and shall make the final determination
19 no later than the 30th day after the end of the public comment period.

20 (e) The department of administration shall send a notice that describes its final
21 determination under par. (a) to the legislative reference bureau for publication in the
22 administrative register.

23 (f) If the department of administration determines under par. (a) that attaining
24 the water quality standard for phosphorus through compliance with water quality
25 based effluent limitations ^{that require a major facility upgrade} is not feasible, the determination remains in effect until

1 the department of administration finds under sub. (3) (c) 1. that the determination
2 is no longer accurate.

3 (3) REVIEW OF FINDINGS AND REQUIREMENTS OF VARIANCE. (a) Every ⁵10 years,
4 beginning in ²⁰¹⁹2023, if a determination under sub. (2) (a) that attaining the water
5 quality standard for phosphorus through compliance with water quality based
6 effluent limitations is not feasible ^{the department of administration in consultation with the} is in effect, the department of natural resources
7 shall ^{prepare} submit a report, no later than September 1, ~~to the department of~~
8 ~~administration~~ regarding any changes in the technology available for controlling
9 phosphorus discharges from point sources and regarding the effluent limitations for
10 phosphorus that are reasonably ^{available} achievable. The department of natural resources
11 shall consult with permittees that would be subject to water quality based effluent
12 limitations for phosphorus and other interested parties in preparing the report.

13 (b) The department of natural resources shall include all of the following in a
14 report under par. (a):

15 1. A determination of whether technology is reasonably available for point
16 sources to comply with effluent limitations for phosphorus that are more stringent
17 than those in sub. ~~(5) or (6)~~ (a).

18 2. A determination of whether technology is reasonably available for any
19 category of point sources to comply with effluent limitations for phosphorus that are
20 more stringent than those in sub. ~~(5) or (6)~~ (a).

21 3. A determination of whether any technology that is ^{reasonably} available for compliance
22 with effluent limitations for phosphorus that are more stringent than those in sub.
23 ~~(5) or (6)~~ (a) is cost effective.

24 (c) ^{Based on its report} The department of administration shall ^{in consultation with the department of natural resources} review a report under par. (a) and
25 do all of the following:

1 1. Decide whether the determination that attaining the water quality standard
2 for phosphorus through compliance with water quality based effluent limitations is
3 not feasible remains accurate.

4 2. If the department of administration decides under subd. 1. that the ^{initial}
5 determination remains accurate, decide whether it is appropriate to apply more
6 stringent effluent limitations than those in sub. ~~(5) or~~ (6) (a) to all point sources or
7 to any category of point sources, based on the availability and cost effectiveness of
8 technology for compliance and, if so, specify those more stringent effluent limitations
9 based on the report of the department of natural resources under par. (a).

10 (d) The department of administration shall provide public notice of its
11 preliminary decisions under par. (c) no later than the 60th day after receiving the
12 report under par. (a) and shall provide the opportunity for public comment on the
13 decisions for at least 30 days following the public notice.

14 (e) The department of administration shall consider any public comments in
15 making its final decisions under par. (c) and shall make the final decisions no later
16 than the 30th day after the end of the public comment period.

17 (f) The department of administration shall send a notice that describes its final
18 decisions under par. (c) to the legislative reference bureau for publication in the
19 administrative register.

20 (4) AVAILABILITY OF VARIANCE. (a) When a determination under sub. (2) (a) that
21 attaining the water quality standard for phosphorus through compliance with water
22 quality based effluent limitations is not feasible is in effect, ^{(b) A} a permittee may apply
23 for the variance under this section for an existing source in any of the following ways:

24 1. By requesting the variance in the application for reissuance of the permit.

1 2. By requesting the variance within 60 days after the department reissues or
2 modifies the permit to include a water quality based effluent limitation for
3 phosphorus.

4 3. If the department issued a permit to the permittee before the effective date
5 of this subdivision [LRB inserts date], that includes a water quality based effluent
6 limitation for phosphorus, by requesting a modification of the permit, *within 60 days*
 of the modification.

 ***NOTE: Should there be a time limit for requesting the modification (given the
 time limit in subd. 2., which is based on s. 283.15 (2) (am) 1.?

7 4. If the department issued a permit to the permittee before the effective date
8 of this subdivision [LRB inserts date], that includes a water quality based effluent
9 limitation for phosphorus and that requires the permittee to submit to the
10 department options for complying with the water quality based effluent limitation,
11 by submitting a request for the variance as a compliance option.

12 (c)
 ~~(b)~~ After an application for a variance is submitted to the department under
13 par. (a) 2., 3., or 4., and until the last day for seeking review of the department's final
14 decision on the application or a later date fixed by order of the reviewing court, the
15 water quality based effluent limitation for phosphorus and any corresponding
16 compliance schedule are not effective. All other provisions of the permit continue in
17 effect except those for which a petition for review has been submitted under s. 283.63.
18 ~~For those provisions for which an application for a variance has been submitted~~
19 ~~under this subsection, the corresponding or similar provisions of the prior permit~~
20 ~~continue in effect until the last day for seeking review of the department's final~~
21 ~~decision or a later date fixed by order of the reviewing court.~~

 ***NOTE: This is based on s. 281.15 (2) (am) 2. Perhaps the last sentence is not
 needed or perhaps it should be modified to better fit this context.

1 ~~(e) 1. The department shall approve an application under par. (a) for a minor~~
2 ~~source, except that for a minor source with a discharge from a treatment work that~~
3 ~~consists primarily of a stabilization pond system or a lagoon system, the department~~
4 ~~may only approve the application before the end of the useful life of the treatment~~
5 ~~work that exists on the effective date of this subdivision [LRB inserts date].~~

6 (d) ~~2. The department shall approve an application under par. (a) for a point source~~
7 ~~that is not a minor source~~ if the permittee agrees to comply with the requirements
8 under sub. (6).
9 *Certifies that it cannot achieve compliance with water quality based effluent limitations for phosphorus without a major facility upgrade and*

10 ~~3. The department shall approve the request of a permittee for an effluent~~
11 ~~limitation under sub. (6) (a) 2., 3., or 4. based on conventional control technology if~~
12 ~~the permittee demonstrates that it cannot reasonably achieve the numeric limit in~~
13 ~~sub. (6) (a) 2., 3., or 4. and provides sufficient information for the department to~~
14 ~~determine the concentration of phosphorus that can be achieved by the use of~~
15 ~~conventional control technology.~~

16 (c) ~~(d)~~ The variance under this section remains in effect for a point source until the
17 permit is reissued, modified, or revoked and reissued.

18 (f) ~~(e)~~ Notwithstanding s. 227.42, there is no right to a hearing under this
19 subsection.

20 (g) ~~(f)~~ If the department approves a variance under this section and the
21 department issues a modified water quality based effluent limitation under s. 283.63
22 for phosphorus, the permittee shall comply with the least stringent of the 2 effluent
23 limitations.

24 ~~(5) VARIANCE PROVISIONS FOR MINOR SOURCES. Except as provided in sub. (7), the~~
25 ~~department shall include all of the following in the permit for a minor source for~~
 ~~which the department approves the variance under this section:~~

~~(a) In the first permit for which the department approves the variance, an initial effluent limitation for phosphorus that is equal to the performance of the minor source on the effective date of this paragraph [LRB inserts date].~~

~~—(b) In the first permit for which the department approves the variance, a requirement to implement, before the end of the term of that permit, a plan to optimize the operation of the minor source to limit the amount of phosphorus discharged to the extent possible without a major facility upgrade.~~

~~(c) In the second permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the concentration of phosphorus achieved by optimizing the operation of the minor source as provided in the plan under par. (b), calculated as a monthly average.~~

~~(d) In the third and each subsequent permit for which the department approves the variance, a requirement to maintain compliance with the effluent limitation for phosphorus described in par. (c).~~

(6) VARIANCE PROVISIONS FOR OTHER DISCHARGERS. (a) Except as provided in ^{par. (b)} sub. (7), the department shall include ^{interim limits} all of the following _A in the permit for a point source, other than a minor source, for which the department approves the variance under this section:

1. In the first permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the greater of 0.8 milligrams per liter as a monthly average or a concentration as a monthly average that is 20 percent lower than the average concentration of phosphorus in the source's effluent for the past 5 years.

2. In the 2nd permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to ~~the greater of 0.6 milligrams per liter as a monthly average or the concentration of phosphorus that can be achieved by the use of conventional control technology as a monthly average.~~

3. In the 3rd permit for which the department includes the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to ~~the greater of 0.5 milligrams per liter as a monthly average or the concentration of phosphorus that can be achieved by the use of conventional control technology as a monthly average.~~

4. In the 4th permit for which the department includes the variance, a requirement to achieve, by the end of the term of that permit, compliance with ~~an effluent limitation for phosphorus equal to the greater of 0.4 milligrams per liter as a monthly average or the concentration of phosphorus that can be achieved by the use of conventional control technology as a monthly average and a compliance schedule that requires the permittee to achieve compliance with~~ ^{final} the water quality

^{1., 2. or 3.,} based effluent limitation for phosphorus ~~not more than 5 years after the end of the~~

~~term of that permit.~~ ^{(b) If a point source certifies that it cannot achieve the applicable interim limit in par. (a) without a major facility upgrade, it shall maintain compliance with the best achievable interim limit, but shall in no event ~~shall~~ exceed the limit established pursuant to S. 283.11(3)(am),}

^{on the} ~~(c) -~~(b) In the permit for a point source, ~~other than a minor source,~~ ^{interim} for which the ~~department~~ ^{established} approves the variance under this section, in addition to the requirements under par. (a) or sub. (7), the department shall require the permittee to implement the permittee's choice of the following measures to reduce the amount of phosphorus entering the waters of the state:

1. Making payments to a county as provided in sub. (8).

1 2. Entering into a binding, written agreement with the department under
2 which the permittee constructs a project or implements a plan that is designed to
3 result in an annual reduction of phosphorus pollution from other sources in the basin
4 in which the point source is located, in an amount equal to the difference between the
5 annual amount of phosphorus discharged by the point source and the target value.

6 3. Entering into a binding written agreement, that is approved by the
7 department, with another person under which the person constructs a project or
8 implements a plan that is designed to result in an annual reduction of phosphorus
9 pollution from other sources in the basin in which the point source is located, in an
10 amount equal to the difference between the annual amount of phosphorus
11 discharged by the point source and the target value.

12 (7) MORE STRINGENT EFFLUENT LIMITATIONS. If the department of administration
13 determines under sub. (3) (c) 2. that it is appropriate to apply more stringent effluent
14 limitations than those in sub. (5) or (6) (a) to all point sources or to a category of point
15 sources, the department of natural resources shall include the more stringent
16 effluent limitations specified under sub. (3) (c) 2. in permits reissued, modified, or
17 revoked and reissued after that determination for all point sources or for the category
18 of point sources to which the more stringent effluent limitations apply.

19 (8) PAYMENTS TO COUNTIES. (a) 1. A permittee that chooses to make payments
20 for phosphorus reduction under sub. (6) ^(c) 1. shall make the payments to a county
21 ^{each} ~~that is~~ participating ^{county} in the program under this subsection and that has territory
22 within the basin in which the point source is located, ^{based upon the percentage of land the county has within the} or, with the approval of the ^{basin.}
23 ~~department, to another county participating in the program. If more than one county~~
24 ~~that participates in the program under this subsection has territory within the basin~~
25 ~~in which the point source is located, the permittee shall make the payments to the~~

1 ~~county specified by the department.~~ The permittee shall make a payment by March
2 1 of each calendar year in the amount equal to the per pound amount under subd.
3 2. times the number of pounds by which the amount of phosphorus discharged by the
4 point source during the previous year exceeded the point source's target value.

5 2. The per pound payment for this subsection is \$50 beginning on the effective
6 date of this subdivision [LRB inserts date]. Beginning in 2015, the department
7 shall adjust the per pound payment each year by a percentage equal to the average
8 annual percentage change in the U.S. consumer price index for all urban consumers,
9 U.S. city average, as determined by the federal department of labor, for the 12
10 months ending on the preceding December 31. The adjusted amount takes effect for
11 permits reissued on April 1. The per pound payment in effect when a permit is
12 reissued applies for the term of the permit.

13 (b) 1. A county shall use payments received under this subsection to provide
14 cost sharing under s. 281.16 (3) (e) or (4) for projects to reduce the amount of
15 phosphorus entering the waters of the state or for staff to implement projects to
16 reduce the amount of phosphorus entering the waters of the state from nonpoint
17 sources.

18 2. A county shall use at least ⁶⁵~~60~~ percent of the amounts received under this
19 subsection to provide cost sharing under s. 281.16 (3) (e) or (4). ~~If, during a year, a~~
20 ~~county uses payments received under this subsection to fill one or more full-time~~
21 ~~equivalent positions, the county shall use at least 75 percent of the payments~~
22 ~~received under this subsection in the next year to provide cost sharing under s.~~
23 ~~281.16 (3) (e) or (4).~~ *3. The counties shall use cost share dollars paid under this section*
to target those facilities or practices within the county that can
provide the greatest phosphorus reduction.

24 4. ~~3.~~ No later than May 1 of the year following a year in which a county receives
25 payments under this subsection, the county shall submit an annual report to the

1 department of natural resources, the department of administration, the department
2 of agriculture, trade and consumer protection, and each permittee from which it
3 received payments during the previous year. In the annual report, the county shall
4 describe the projects for which it provided cost sharing, quantify the associated
5 phosphorus reductions achieved using accepted modeling technology, and identify
6 any staff funded with the payments.

7 5. 4. The department shall evaluate reports submitted under subd. 3. If the
8 department determines that a county is not using the payments to effectively reduce
9 the amount of phosphorus entering the waters of the state from nonpoint sources, the
10 department may require permittees who made the payments to ^{partially or fully} ~~make future~~
11 ^{exclude that county from future} ~~payments to a county specified by the department.~~

12 6. 5. A county shall notify the department if it chooses not to participate in the
13 program under this subsection.

14 SECTION 3. 283.63 (1) (am) of the statutes is amended to read:

15 283.63 (1) (am) After a verified petition for review is filed and until the last day
16 for seeking review of the department's decision or a later date fixed by order of the
17 reviewing court, any term or condition, thermal effluent limitation or water quality
18 based effluent limitation which is the subject of the petition is not effective. All other
19 provisions of the permit continue in effect except those for which an application for
20 a variance has been submitted under s. 283.15 or 283.16. For those provisions for
21 which a petition for review has been submitted under this section, the corresponding
22 or similar provisions of the prior permit continue in effect until the last day for
23 seeking review of the department's final decision or a later date fixed by order of the
24 reviewing court.

25 SECTION 4. 283.63 (4) of the statutes is amended to read:

283.63 (4) Subsections (1) and (2) do not apply to the modification of a permit which implements a decision under s. 283.15 or 283.16 or the denial of a request for a variance under s. 283.15 or 283.16. A proceeding under subs. (1) and (2) shall not be delayed pending completion of the review of a variance request under s. 283.15 or 283.16.

(END)



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-3079/PZ
RCT:cjs:jm

Tues 1/14

stays

rmr

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

ONote

Gen Cat

AN ACT *to amend* 283.63 (1) (am) and 283.63 (4); and *to create* 283.13 (7) and
283.16 of the statutes; *and total suspended solids* relating to: phosphorus discharges to the waters of the
state and a statewide variance from the water quality standard for phosphorus
for certain dischargers.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 283.13 (7) of the statutes is created to read:

283.13 (7) COMPLIANCE WITH THE WATER QUALITY STANDARD FOR PHOSPHORUS. (a)

In this subsection, "adaptive management option" means an approach to achieving
compliance with a water quality standard adopted under s. 281.15 under which a
permittee implements a plan to achieve the water quality standard through

(CS) Adaptive management

Insert 1-8

Insert 1-9

1 verifiable reductions in the amount of water pollution from point sources and
2 nonpoint sources, as defined in s. 281.16 (1) (e), in a basin or other area specified by
3 the department and uses monitoring data, modeling, and other appropriate
4 information to adjust the plan if needed to achieve compliance.

5 (b) If the department authorizes a permittee to use an adaptive management
6 option to achieve compliance with the water quality standard for phosphorus, the
7 department may specify a date under sub. (5) that provides 5 permit terms for the
8 permittee to comply with its water quality based effluent limitation for phosphorus. *Insert 2-6*
4 *Insert 2-8*

9 **SECTION 2.** 283.16 of the statutes is created to read:

10 **283.16 Statewide variance for phosphorus. (1) DEFINITIONS.** In this
11 section:

12 (a) "Basin" means the drainage area identified by an 8-digit hydrologic unit
13 code, as determined by the U.S. Geological Survey.

14 (b) "Category" means a class or category of point sources specified by the
15 department under s. 283.13 (1).

16 (c) ~~"Conventional control technology" means optimal use of a technology for~~
17 ~~controlling phosphorus discharges that is appropriate for a point source and that is~~
18 ~~most commonly used at point sources in the same category in the majority of states~~
19 ~~adjoining this state.~~

20 (d) "Existing source" means a point source that was covered by a permit on
21 December 1, 2010.

22 (e) "Major facility upgrade" means *Insert 2-22* ~~construction or installation, including~~
23 ~~installation of a filtration system, for which the permittee must acquire a substantial~~
24 ~~amount of property or for which the permittee must the develop an extensive~~
25 ~~financing plan and obtain financing.~~

✓ 1 (f) "Minor source" means a point source with a discharge from a treatment work
2 that consists primarily of a stabilization pond system or a lagoon system or with a
3 discharge of less than 100,000 gallons per day.

4 (g) "Nonpoint source" has the meaning given in s. 281.16 (1) (e).

5 (h) "Target value" means the number of pounds of phosphorus that would be
6 discharged from a point source during a year if the average concentration of
7 phosphorus in the effluent discharged by the point source during the year was 0.2
8 milligrams per liter.

9 (i) "Water quality based effluent limitation" means an effluent limitation under
10 s. 283.13 (5), including an effluent limitation based on a total maximum daily load
11 under 33 USC 1313 (d) (1) (C) approved by the federal environmental protection
12 agency.

13 (2) INITIAL DETERMINATION CONCERNING THE WATER QUALITY STANDARD FOR
14 PHOSPHORUS. (a) The department of administration ^{Insert 3-14} shall determine whether
15 attaining the water quality standard for phosphorus, adopted under s. 281.15,
16 through compliance with water quality based effluent limitations ^{Insert 3-16} is not feasible
17 because it would cause substantial and widespread adverse social and economic
18 impacts on a statewide basis.

19 (b) The department of administration shall include all of the following in its
20 determination under par. (a):

21 1. A calculation of the statewide cost of compliance with water quality based
22 effluent limitations for phosphorus. ^{Insert 3-22}

23 2. A calculation of the statewide per household cost for water pollution control
24 by publicly owned treatment works, ^{Insert 3-24} including the projected costs of compliance with

those

1 water quality based effluent limitations for phosphorus, and a calculation of the
2 percentage of median household income the per household cost represents.

3 ~~3. A calculation of the statewide cost for minor sources to comply with water~~
4 ~~quality based effluent limitations for phosphorus.~~

5 4. A determination of whether the cost of compliance with water quality based
6 effluent limitations for phosphorus ^{Insert 4-6} would cause substantial adverse social and
7 economic impacts on a statewide basis.

8 5. A determination of whether the cost of compliance with water quality based
9 effluent limitations for phosphorus ^{Insert 4-9} would cause widespread adverse social and
10 economic impacts on a statewide basis.

11 (c) The department of administration shall make a preliminary determination
12 under par. (a) no later than the 60th day after the effective date of this paragraph
13 [LRB inserts date]. The department of administration shall provide public notice,
14 through an electronic notification system that it establishes or selects, of its
15 preliminary determination and shall provide the opportunity for public comment on
16 the preliminary determination for at least 30 days following the public notice.

17 (d) The department of administration shall consider any public comments in
18 making its final determination under par. (a) and shall make the final determination
19 no later than the 30th day after the end of the public comment period.

20 (e) The department of administration shall send a notice that describes its final
21 determination under par. (a) to the legislative reference bureau for publication in the
22 administrative register.

23 (f) If the department of administration determines under par. (a) that attaining
24 the water quality standard for phosphorus through compliance with water quality
25 based effluent limitations ^{Insert 4-25} is not feasible, the determination remains in effect until

the department of administration finds under sub. (3) (c) 1. that the determination is no longer accurate. *Insert 5-2-A*

Insert 5-2-B (3) REVIEW OF FINDINGS AND REQUIREMENTS OF VARIANCE. (a) Every ⁵~~10~~ years, beginning in ~~2023~~ ²⁰¹⁹, if a determination under sub. (2) (a) that attaining the water quality standard for phosphorus through compliance ~~with water quality based~~ ^{effluent limitations} is not feasible is in effect, the department ^{of natural resources}, shall ^{prepare} submit a report, no later than September 1, to the department of administration regarding any changes in the technology available for controlling phosphorus discharges from point sources and regarding the effluent limitations for phosphorus that are reasonably achievable. The department of ^{administration} natural resources shall consult with permittees that would be subject to water quality based effluent limitations for phosphorus and other interested parties in preparing the report.

Insert 5-12 (b) The department of natural resources ^{administration} shall include all of the following in a report under par. (a):

1. A determination of whether technology is reasonably available for point sources to comply with effluent limitations for phosphorus that are more stringent than those in sub. (5) or (6) (a).

2. A determination of whether technology is reasonably available for any category of point sources to comply with effluent limitations for phosphorus that are more stringent than those in sub. (5) or (6) (a).

3. A determination of whether any technology that is ^{reasonably} available for compliance with effluent limitations for phosphorus that are more stringent than those in sub. (5) or (6) (a) is cost effective.

Insert 5-24-A *Insert 5-24-B* (c) The department of administration shall review a report under par. (a) and do all of the following:

1 1. Decide whether the determination that attaining the water quality standard
(2) for phosphorus through compliance with water quality based effluent limitations^{Insert 6-2} is
3 not feasible remains accurate.

4 2. If the department of administration decides under subd. 1. that the
5 determination remains accurate, decide whether it is appropriate to apply more
(6) stringent effluent limitations than those in sub. (5) or (6) (a) to all point sources or
7 to any category of point sources, based on the availability and cost effectiveness of
8 technology for compliance and, if so, specify those more stringent effluent limitations
(9) based on the report of the department of natural resources under par. (a).

10 (d) The department of administration shall provide public notice of its
(11) preliminary decisions under par. (c) no later than the 60th day after ^{preparing} receiving the
12 report under par. (a) and shall provide the opportunity for public comment on the
13 decisions for at least 30 days following the public notice.

14 (e) The department of administration shall consider any public comments in
15 making its final decisions under par. (c) and shall make the final decisions no later
16 than the 30th day after the end of the public comment period.

17 (f) The department of administration shall send a notice that describes its final
18 decisions under par. (c) to the legislative reference bureau for publication in the
19 administrative register.

20 (4) AVAILABILITY OF VARIANCE. (a) When a determination under sub. (2) (a) that
21 attaining the water quality standard for phosphorus through compliance with water
(22) quality based effluent limitations^{Insert 6-22-A} is not feasible is in effect, ^{Insert 6-22-B} a permittee may apply
(23) for the variance under this section for an existing source in any of the following ways:

24 1. By requesting the variance in the application for reissuance of the permit.

2. By requesting the variance within 60 days after the department reissues or modifies the permit to include a water quality based effluent limitation for phosphorus.

3. If the department issued a permit to the permittee before the effective date of this subdivision [LRB inserts date], that includes a water quality based effluent limitation for phosphorus, by requesting a modification of the permit. *Insert 2-6*

***NOTE: Should there be a time limit for requesting the modification (given the time limit in subd. 2., which is based on s. 283.15 (2) (am) 1.?

4. If the department issued a permit to the permittee before the effective date of this subdivision [LRB inserts date], that includes a water quality based effluent limitation for phosphorus and that requires the permittee to submit to the department options for complying with the water quality based effluent limitation, by submitting a request for the variance as a compliance option.

x (12) ^c After an application for a variance is submitted to the department under par. (a) 2., 3., or 4., and until the last day for seeking review of the department's final decision on the application or a later date fixed by order of the reviewing court, the water quality based effluent limitation for phosphorus and any corresponding compliance schedule are not effective. All other provisions of the permit continue in effect except those for which a petition for review has been submitted under s. 283.63.

b (13) *9* For those provisions for which an application for a variance has been submitted under this subsection, the corresponding or similar provisions of the prior permit continue in effect until the last day for seeking review of the department's final decision or a later date fixed by order of the reviewing court.

***NOTE: This is based on s. 281.15 (2) (am) 2. Perhaps the last sentence is not needed or perhaps it should be modified to better fit this context.

X 1 (c) 1. The department shall approve an application under par. (a) for a minor
2 source, except that for a minor source with a discharge from a treatment work that
3 consists primarily of a stabilization pond system or a lagoon system, the department
4 may only approve the application before the end of the useful life of the treatment
5 work that exists on the effective date of this subdivision [LRB inserts date].

6 2. The department shall approve an application under par. (a) for a point source
7 that is not a minor source if the permittee agrees to comply with the requirements
8 under sub. (6).

9 3. The department shall approve the request of a permittee for an effluent
10 limitation under sub. (6) (a) 2., 3., or 4. based on conventional control technology if
11 the permittee demonstrates that it cannot reasonably achieve the numeric limit in
12 sub. (6) (a) 2., 3., or 4. and provides sufficient information for the department to
13 determine the concentration of phosphorus that can be achieved by the use of
14 conventional control technology.

15 (d) The variance under this section remains in effect for a point source until the
16 permit is reissued, modified, or revoked and reissued.

17 (e) Notwithstanding s. 227.42, there is no right to a hearing under this
18 subsection.

19 (f) If the department approves a variance under this section and the
20 department issues a modified water quality based effluent limitation under s. 283.63
21 for phosphorus, the permittee shall comply with the least stringent of the 2 effluent
22 limitations.

X 23 (5) VARIANCE PROVISIONS FOR MINOR SOURCES. Except as provided in sub. (7), the
24 department shall include all of the following in the permit for a minor source for
25 which the department approves the variance under this section:

(a) In the first permit for which the department approves the variance, an initial effluent limitation for phosphorus that is equal to the performance of the minor source on the effective date of this paragraph [LRB inserts date].

(b) In the first permit for which the department approves the variance, a requirement to implement, before the end of the term of that permit, a plan to optimize the operation of the minor source to limit the amount of phosphorus discharged to the extent possible without a major facility upgrade.

(c) In the second permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the concentration of phosphorus achieved by optimizing the operation of the minor source as provided in the plan under par. (b), calculated as a monthly average.

(d) In the third and each subsequent permit for which the department approves the variance, a requirement to maintain compliance with the effluent limitation for phosphorus described in par. (c).

(6) VARIANCE PROVISIONS ~~FOR OTHER DISCHARGERS~~. (a) Except as provided in sub. ^{par. (a) or}

(7), the department shall include ^{interim limits} all of the following in the permit for a point source,

other than a minor source, for which the department approves the variance under this section:

1. In the first permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the greater of 0.8 milligrams per liter as a monthly average or a concentration as a monthly average that is 20 percent lower than the average concentration of phosphorus in the source's effluent for the past 5 years.

2. In the 2nd permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the greater of 0.6 milligrams per liter as a monthly average or the concentration of phosphorus that can be achieved by the use of conventional control technology as a monthly average.

3. In the 3rd permit for which the department includes the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the greater of 0.5 milligrams per liter as a monthly average or the concentration of phosphorus that can be achieved by the use of conventional control technology as a monthly average.

4. In the 4th permit for which the department includes the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to the greater of 0.4 milligrams per liter as a monthly average or the concentration of phosphorus that can be achieved by the use of conventional control technology as a monthly average and a compliance schedule that requires the permittee to achieve compliance with the water quality based effluent limitation for phosphorus not more than 5 years after the end of the term of that permit.

Insert 1018 → (b) In the permit for a point source, other than a minor source, for which the department approves the variance under this section, in addition to the requirements under par. (a) ^{or (am)} or sub. (7), the department shall require the permittee to implement the permittee's choice of the following measures to reduce the amount of phosphorus entering the waters of the state:

1. Making payments to a county ^{or counties} as provided in sub. (8).

1 2. Entering into a binding, written agreement with the department under
2 which the permittee constructs a project or implements a plan that is designed to
3 result in an annual reduction of phosphorus pollution from other sources in the basin
4 in which the point source is located, in an amount equal to the difference between the
5 annual amount of phosphorus discharged by the point source and the target value.

6 3. Entering into a binding written agreement, that is approved by the
7 department, with another person under which the person constructs a project or
8 implements a plan that is designed to result in an annual reduction of phosphorus
9 pollution from other sources in the basin in which the point source is located, in an
10 amount equal to the difference between the annual amount of phosphorus
11 discharged by the point source and the target value.

12 (7) MORE STRINGENT EFFLUENT LIMITATIONS. If the department of administration
13 determines under sub. (3) (c) 2. that it is appropriate to apply more stringent effluent
14 limitations than those in sub. ⁹(5) or (6) (a) to all point sources or to a category of point
15 sources, the department of natural resources shall include the more stringent
16 effluent limitations specified under sub. (3) (c) 2. in permits reissued, modified, or
17 revoked and reissued after that determination for all point sources or for the category
18 of point sources to which the more stringent effluent limitations apply.

19 (8) PAYMENTS TO COUNTIES. (a) 1. A permittee that chooses to make payments
20 for phosphorus reduction under sub. (6) (b) 1. shall make the payments to ^{each}a county
21 that is participating in the program under this subsection and that has territory
22 within the basin in which the point source is located or, with the approval of the
23 department, to another county participating in the program. If more than one county
24 that participates in the program under this subsection has territory within the basin
25 in which the point source is located, the permittee shall make the payments to the

Insert 11-23

1 county specified by the department. The permittee shall make ^{total} a payment by March
2 1 of each calendar year in the amount equal to the per pound amount under subd.
3 2. times the number of pounds by which the amount of phosphorus discharged by the
4 point source during the previous year exceeded the point source's target value.

Insert 12-5/ 2. The per pound payment for this subsection is \$50 beginning on the effective
6 date of this subdivision [LRB inserts date]. Beginning in 2015, the department
7 shall adjust the per pound payment each year by a percentage equal to the average
8 annual percentage change in the U.S. consumer price index for all urban consumers,
9 U.S. city average, as determined by the federal department of labor, for the 12
10 months ending on the preceding December 31. The adjusted amount takes effect for
11 permits reissued on April 1. The per pound payment in effect when a permit is
12 reissued applies for the term of the permit.

13 (b) 1. A county shall use payments received under this subsection to provide
14 cost sharing under s. 281.16 (3) (e) or (4) for projects to reduce the amount of
15 phosphorus entering the waters of the state or for staff to implement projects to
16 reduce the amount of phosphorus entering the waters of the state from nonpoint
17 sources.

18 2. A county shall use at least ^{80/65} 60 percent of the amounts received under this
19 subsection to provide cost sharing under s. 281.16 (3) (e) or (4). If, during a year, a
20 county uses payments received under this subsection to fill one or more full-time
21 equivalent positions, the county shall use at least 75 percent of the payments
22 received under this subsection in the next year to provide cost sharing under s.
23 281.16 (3) (e) or (4).

24 3. No later than May 1 of the year following a year in which a county receives
25 payments under this subsection, the county shall submit an annual report to the

1 department of natural resources, the department of administration, the department
2 of agriculture, trade and consumer protection, and each permittee from which it
3 received payments during the previous year. In the annual report, the county shall
4 describe the projects for which it provided cost sharing, quantify the associated
5 phosphorus reductions achieved using accepted modeling technology, and identify
6 any staff funded with the payments.

7 4. The department shall evaluate reports submitted under subd. 3. If the
8 department determines that a county is not using the payments to effectively reduce
9 the amount of phosphorus entering the waters of the state from nonpoint sources, the
10 department may require permittees who made the payments to ~~make~~ ^{eliminate or} future ^{reduce}
11 payments to ^{of the} ~~a~~ county specified by the department.

12 5. A county shall notify the department if it chooses not to participate in the
13 program under this subsection.

14 **SECTION 3.** 283.63 (1) (am) of the statutes is amended to read:

15 283.63 (1) (am) After a verified petition for review is filed and until the last day
16 for seeking review of the department's decision or a later date fixed by order of the
17 reviewing court, any term or condition, thermal effluent limitation or water quality
18 based effluent limitation which is the subject of the petition is not effective. All other
19 provisions of the permit continue in effect except those for which an application for
20 a variance has been submitted under s. 283.15 or 283.16. For those provisions for
21 which a petition for review has been submitted under this section, the corresponding
22 or similar provisions of the prior permit continue in effect until the last day for
23 seeking review of the department's final decision or a later date fixed by order of the
24 reviewing court.

25 **SECTION 4.** 283.63 (4) of the statutes is amended to read:

1 283.63 (4) Subsections (1) and (2) do not apply to the modification of a permit
2 which implements a decision under s. 283.15 or 283.16 or the denial of a request for
3 a variance under s. 283.15 or 283.16. A proceeding under subs. (1) and (2) shall not
4 be delayed pending completion of the review of a variance request under s. 283.15
5 or 283.16.

(END)

note

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/P3ins
RCT.....

1

2

Insert 1-8

3 (no 9)

or a total maximum daily load under 33 USC 1313 (d) (1) (C) approved by the

4

federal environmental protection agency

5

Insert 1-9

6 (no 9)

or total maximum daily load

7

Insert 2-6

8 (no 9)

or an approved total maximum daily load for total suspended solids

9

Insert 2-8

10 (no 9)

or total suspended solids

11

Insert 2-22

12 (no 9)

the addition of new treatment equipment and a new treatment process

(9)

****NOTE: I did not include the second proposed sentence because under this definition, optimizing existing equipment and processes clearly does not constitute a major facility upgrade. The rest of the language proposed for the first sentence is not needed because the context in which the term is used makes clear what the reason for the upgrade would be. If this explanation is not clear, try using the proposed definition in place of the term "major facility upgrade" elsewhere in the draft.

13

Insert 3-14

14 (no 9)

, in consultation with the department of natural resources,

15

Insert 3-16

16 (no 9)

by point sources that cannot achieve compliance without major facility

17

upgrades

18

Insert 3-22

19 (no 9)

by point sources that cannot achieve compliance without major facility

20

upgrades

1 **Insert 3-24**

2 (no 9) that cannot achieve compliance with water quality based effluent limitations
3 for phosphorus without major facility upgrades

4 **Insert 4-6**

5 (no 9) by point sources that cannot achieve compliance without major facility
6 upgrades

7 **Insert 4-9**

8 (no 9) by point sources that cannot achieve compliance without major facility
9 upgrades

10 **Insert 4-25**

11 (no 9) by point sources that cannot achieve compliance without major facility
12 upgrades

13 **Insert 5-2-A**

14 (no 9) or September 1, 2039, whichever is earlier

15 **Insert 5-2-B**

****NOTE: The draft should contain a specific end date for the effectiveness of the determination of infeasibility to clarify that the waiver is only available for four permit terms and to terminate the requirement to conduct the reviews under sub. (3). I am not certain, though, what that date should be.

16 **Insert 5-5² 5-6-A**

17 (no 9) by point sources that cannot achieve compliance without major facility
18 upgrades

19 **Insert 5-6-B**

20 (no 9) of administration, in consultation with the department

21 **Insert 5-12**

****NOTE: The redraft instructions indicated that the word "achievable" at the end of the first sentence in this paragraph should be changed to "available," but this part of the sentence relates to effluent limitations so "available" does not seem to work.

1 **Insert 5-24-A**

2 ~~no 9~~ Based on its report under par. (a),

3 **Insert 5-24-B**

4 ~~no 9~~ , in consultation with the department of natural resources,

5 **Insert 6-2**

6 ~~no 9~~ by point sources that cannot achieve compliance without major facility
7 upgrades

8 **Insert 6-22-A**

9 ~~no 9~~ by point sources that cannot achieve compliance without major facility
10 upgrades

11 **Insert 6-22-B**

12 ~~no 9~~ a permittee is eligible for a variance to the water quality standard for
13 phosphorus for an existing source if the permittee certifies that the existing source
14 cannot achieve compliance with the water quality based effluent limitation for
15 phosphorus without a major facility upgrade and agrees to comply with the
16 requirements under sub. (6).

✓ 17 ~~91~~ (b) A

18 **Insert 7-6**

19 ~~no 9~~ no later than the 60th day after the effective date of this subdivision [LRB
20 inserts date]

21 **Insert 10-18**

22 (am) If a permittee certifies that the point source cannot achieve compliance
23 with an interim limit in par. (a) 1., 2., or 3. without a major facility upgrade, the
24 department shall include in the permit a requirement to achieve compliance with the

1 highest achievable interim limit, except that the department may not include an
2 interim limit that is higher than the limit established under s. 283.11 (3) (am).

****NOTE: I used "highest achievable interim limit" because if the point source cannot achieve the limit in par. (a) 1., there would not be a "last" achievable interim limit. Please let me know if a different approach should be taken.

3 **Insert 11-23**

4 ^{no 9} in proportion to the amount of territory each county has within the basin

5 **Insert 12-4**

****NOTE: What happens if no county in the basin participates? Should this option only be available if at least one county with territory in the basin participates?

6 **Insert 12-19**

7 ^{no 9} A county shall provide cost sharing for projects in the county that will provide
8 the maximum reduction in the amount of phosphorus entering the waters of the
9 state.

****NOTE: It isn't clear to me whether the intent is to require counties to fund the biggest projects (without regard to cost per pound of reduction) or to fund the most cost-effective projects, regardless of the amount of reduction from each project (which should result in getting the most reduction for the available money). In either event, I am unsure how counties or the department could identify all of the potential projects in order to tell that the "right" projects are being funded.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/P3dn

RCT:1:....

js

- date -

This is a new version of the draft concerning phosphorus discharges. It should be reviewed carefully. There are notes in the draft concerning specific provisions.

I added some changes that seemed necessary to reflect the requested changes. If it would be helpful, I can run our compare program and provide the output showing all of the changes from the previous version. In some cases, I used language different from that proposed for reasons that include ensuring consistency throughout the draft. We can discuss any concerns about these changes.

As requested, this draft provides for review of the waiver every five years. In the case of a multiuser waiver like this one, though, even a five-year review will not coincide with the renewal of ~~most~~ permits. As I explained in the previous drafter's note, EPA has taken the position that waivers must be reviewed every three years. A less extensive review than provided in the draft might be acceptable, but unless EPA has changed its position, the lack of a three-year review might result in disapproval of the waiver.

←
←

all

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3079/P3dn
RCT:cjs:jm

January 10, 2014

This is a new version of the draft concerning phosphorus discharges. It should be reviewed carefully. There are notes in the draft concerning specific provisions.

I added some changes that seemed necessary to reflect the requested changes. If it would be helpful, I can run our compare program and provide the output showing all of the changes from the previous version. In some cases, I used language different from that proposed for reasons that include ensuring consistency throughout the draft. We can discuss any concerns about these changes.

As requested, this draft provides for review of the waiver every five years. In the case of a multiuser waiver like this one, though, even a five-year review will not coincide with the renewal of all permits. As I explained in the previous drafter's note, EPA has taken the position that waivers must be reviewed every three years. A less extensive review than provided in the draft might be acceptable, but unless EPA has changed its position, the lack of a three-year review might result in disapproval of the waiver.

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

-3079

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

1/14/14 Call From Ryan of Sen. Cowles' office!
He is sending over some notes on the 1P3. If
I have questions, I should call Paul Kent.

RIT



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-3079/P3
RCT:cjs:jm

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT** *to amend* 283.63 (1) (am) and 283.63 (4); and *to create* 283.13 (7) and
2 283.16 of the statutes; **relating to:** phosphorus and total suspended solids
3 discharges to the waters of the state and a statewide variance from the water
4 quality standard for phosphorus for certain dischargers.

Analysis by the Legislative Reference Bureau

 This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

5 **SECTION 1.** 283.13 (7) of the statutes is created to read:
6 283.13 (7) ADAPTIVE MANAGEMENT. (a) In this subsection, "adaptive
7 management option" means an approach to achieving compliance with a water
8 quality standard adopted under s. 281.15 or a total maximum daily load under 33
9 USC 1313 (d) (1) (C) approved by the federal environmental protection agency under

1 which a permittee implements a plan to achieve the water quality standard or total
2 maximum daily load through verifiable reductions in the amount of water pollution
3 from point sources and nonpoint sources, as defined in s. 281.16 (1) (e), in a basin or
4 other area specified by the department and uses monitoring data, modeling, and
5 other appropriate information to adjust the plan if needed to achieve compliance.

6 ^{The} (b) ^{may} If ~~the~~ department authorizes a permittee to use an adaptive management
7 option to achieve compliance with the water quality standard for phosphorus or an
8 approved total maximum daily load for total suspended solids, ^{and if it does so,} the department may
9 specify a date under sub. (5) that provides 4 permit terms for the permittee to comply
10 with its water quality based effluent limitation for phosphorus or total suspended
11 solids.

12 SECTION 2. 283.16 of the statutes is created to read:

13 **283.16 Statewide variance for phosphorus. (1) DEFINITIONS.** In this
14 section:

15 (a) "Basin" means the drainage area identified by an 8-digit hydrologic unit
16 code, as determined by the U.S. Geological Survey.

17 (b) "Category" means a class or category of point sources specified by the
18 department under s. 283.13 (1).

19 (d) "Existing source" means a point source that was covered by a permit on
20 December 1, 2010.

21 (e) "Major facility upgrade" means the addition of new treatment equipment
22 and a new treatment process.

****NOTE: I did not include the second proposed sentence because, under this
definition, optimizing existing equipment and processes clearly does not constitute a
major facility upgrade. The rest of the language proposed for the first sentence is not
needed because the context in which the term is used makes clear what the reason for the

OK

upgrade would be. If this explanation is not clear, try using the proposed definition in place of the term “major facility upgrade” elsewhere in the draft.

1 (g) “Nonpoint source” has the meaning given in s. 281.16 (1) (e).

2 (h) “Target value” means the number of pounds of phosphorus that would be
3 discharged from a point source during a year if the average concentration of
4 phosphorus in the effluent discharged by the point source during the year was 0.2
5 milligrams per liter.

6 (i) “Water quality based effluent limitation” means an effluent limitation under
7 s. 283.13 (5), including an effluent limitation based on a total maximum daily load
8 under 33 USC 1313 (d) (1) (C) approved by the federal environmental protection
9 agency.

10 (2) INITIAL DETERMINATION CONCERNING THE WATER QUALITY STANDARD FOR
11 PHOSPHORUS. (a) The department of administration, in consultation with the
12 department of natural resources, shall determine whether attaining the water
13 quality standard for phosphorus, adopted under s. 281.15, through compliance with
14 water quality based effluent limitations by point sources that cannot achieve
15 compliance without major facility upgrades is not feasible because it would cause
16 substantial and widespread adverse social and economic impacts on a statewide
17 basis.

18 (b) The department of administration shall include all of the following in its
19 determination under par. (a):

20 1. A calculation of the statewide cost of compliance with water quality based
21 effluent limitations for phosphorus by point sources that cannot achieve compliance
22 without major facility upgrades.

1 2. A calculation of the statewide per household cost for water pollution control
2 by publicly owned treatment works that cannot achieve compliance with water
3 quality based effluent limitations for phosphorus without major facility upgrades,
4 including the projected costs of compliance with those water quality based effluent
5 limitations, and a calculation of the percentage of median household income the per
6 household cost represents.

7 4. A determination of whether the cost of compliance with water quality based
8 effluent limitations for phosphorus by point sources that cannot achieve compliance
9 without major facility upgrades would cause substantial adverse social and economic
10 impacts on a statewide basis.

11 5. A determination of whether the cost of compliance with water quality based
12 effluent limitations for phosphorus by point sources that cannot achieve compliance
13 without major facility upgrades would cause widespread adverse social and
14 economic impacts on a statewide basis.

15 (c) The department of administration shall make a preliminary determination
16 under par. (a) no later than the 60th day after the effective date of this paragraph
17 [LRB inserts date]. The department of administration shall provide public notice,
18 through an electronic notification system that it establishes or selects, of its
19 preliminary determination and shall provide the opportunity for public comment on
20 the preliminary determination for at least 30 days following the public notice.

21 (d) The department of administration shall consider any public comments in
22 making its final determination under par. (a) and shall make the final determination
23 no later than the 30th day after the end of the public comment period.

1 (e) The department of administration shall send a notice that describes its final
2 determination under par. (a) to the legislative reference bureau for publication in the
3 administrative register.

4 (f) If the department of administration determines under par. (a) that attaining
5 the water quality standard for phosphorus through compliance with water quality
6 based effluent limitations by point sources that cannot achieve compliance without
7 major facility upgrades is not feasible, the determination remains in effect until the
8 department of administration finds under sub. (3) (c) 1. that the determination is no
9 longer accurate or ~~September 1, 2039, whichever is earlier.~~

****NOTE: The draft should contain a specific end date for the effectiveness of the
determination of infeasibility to clarify that the waiver is only available for four permit
terms and to terminate the requirement to conduct the reviews under sub. (3). I am not
certain, though, what that date should be. *That is the problem especially if there is a delayed
permit issuance at some point.*

10 (3) REVIEW OF FINDINGS AND REQUIREMENTS OF VARIANCE. (a) Every 5 years,
11 beginning in 2019, if a determination under sub. (2) (a) that attaining the water
12 quality standard for phosphorus through compliance with water quality based
13 effluent limitations by point sources that cannot achieve compliance without major
14 facility upgrades is not feasible is in effect, the department of administration, in
15 consultation with the department of natural resources, shall prepare a report, no
16 later than September 1, regarding any changes in the technology available for
17 controlling phosphorus discharges from point sources and regarding the effluent
18 limitations for phosphorus that are reasonably achievable. The department of
19 administration shall consult with permittees that would be subject to water quality
20 based effluent limitations for phosphorus and other interested parties in preparing
21 the report.

****NOTE: The redraft instructions indicated that the word "achievable" at the end
of the first sentence in this paragraph should be changed to "available," but this part of
the sentence relates to effluent limitations so "available" does not seem to work.

OK

1 (b) The department of administration shall include all of the following in a
2 report under par. (a):

3 1. A determination of whether technology is reasonably available for point
4 sources to comply with effluent limitations for phosphorus that are more stringent
5 than those in sub. (6) (a).

6 2. A determination of whether technology is reasonably available for any
7 category of point sources to comply with effluent limitations for phosphorus that are
8 more stringent than those in sub. (6) (a).

9 3. A determination of whether any technology that is reasonably available for
10 compliance with effluent limitations for phosphorus that are more stringent than
11 those in sub. (6) (a) is cost effective.

12 (c) Based on its report under par. (a), the department of administration, in
13 consultation with the department of natural resources, shall do all of the following:

14 1. Decide whether the determination that attaining the water quality standard
15 for phosphorus through compliance with water quality based effluent limitations by
16 point sources that cannot achieve compliance without major facility upgrades is not
17 feasible remains accurate.

18 2. If the department of administration decides under subd. 1. that the
19 determination remains accurate, decide whether it is appropriate to apply more
20 stringent effluent limitations than those in sub. (6) (a) to all point sources or to any
21 category of point sources, based on the availability and cost effectiveness of
22 technology for compliance and, if so, specify those more stringent effluent limitations
23 based on the report under par. (a).

24 (d) The department of administration shall provide public notice of its
25 preliminary decisions under par. (c) no later than the 60th day after preparing the

1 report under par. (a) and shall provide the opportunity for public comment on the
2 decisions for at least 30 days following the public notice.

3 (e) The department of administration shall consider any public comments in
4 making its final decisions under par. (c) and shall make the final decisions no later
5 than the 30th day after the end of the public comment period.

6 (f) The department of administration shall send a notice that describes its final
7 decisions under par. (c) to the legislative reference bureau for publication in the
8 administrative register.

9 (4) AVAILABILITY OF VARIANCE. (a) When a determination under sub. (2) (a) that
10 attaining the water quality standard for phosphorus through compliance with water
11 quality based effluent limitations by point sources that cannot achieve compliance
12 without major facility upgrades is not feasible is in effect, a permittee is eligible for
13 a variance to the water quality standard for phosphorus ~~for an existing source~~ if the
14 permittee certifies that the existing source ^{cannot} achieve compliance with the
15 water quality based effluent limitation for phosphorus without a major facility
16 upgrade and agrees to comply with the requirements under sub. (6).

17 (b) A permittee may apply for the variance under this section in any of the
18 following ways:

19 1. By requesting the variance in the application for reissuance of the permit.
20 2. By requesting the variance within 60 days after the department reissues or
21 modifies the permit to include a water quality based effluent limitation for
22 phosphorus.

23 3. If the department issued a permit to the permittee before the effective date
24 of this subdivision [LRB inserts date], that includes a water quality based effluent

1 limitation for phosphorus, by requesting a modification of the permit ~~no later than~~
Note: a permit modification can be requested at any time. 283.15 (2)(am)'s 1 presents a different situation.
2 ~~the 60th day after the effective date of this subdivision [LRB inserts date].~~

3 4. If the department issued a permit to the permittee before the effective date
4 of this subdivision [LRB inserts date], that includes a water quality based effluent
5 limitation for phosphorus and that requires the permittee to submit to the
6 department options for complying with the water quality based effluent limitation,
7 by submitting a request for the variance as a compliance option.

8 (c) After an application for a variance is submitted to the department under par.
9 (b) 2., 3., or 4., and until the last day for seeking review of the department's final
10 decision on the application or a later date fixed by order of the reviewing court, the
11 water quality based effluent limitation for phosphorus and any corresponding
12 compliance schedule are not effective. All other provisions of the permit continue in
13 effect except those for which a petition for review has been submitted under s. 283.63.

14 (d) The variance under this section remains in effect for a point source until the
15 permit is reissued, modified, or revoked and reissued.

16 (e) Notwithstanding s. 227.42, there is no right to a hearing under this
17 subsection.

18 (f) If the department approves a variance under this section and the
19 department issues a modified water quality based effluent limitation under s. 283.63
20 for phosphorus, the permittee shall comply with the least stringent of the 2 effluent
21 limitations.

22 (6) VARIANCE PROVISIONS. (a) Except as provided in par. (am) or sub. (7), the
23 department shall include the following interim limits in the permit for a point source
24 for which the department approves the variance under this section:

1 1. In the first permit for which the department approves the variance, a
2 requirement to achieve, by the end of the term of that permit, compliance with an
3 effluent limitation for phosphorus equal to 0.8 milligrams per liter as a monthly
4 average.

5 2. In the 2nd permit for which the department approves the variance, a
6 requirement to achieve, by the end of the term of that permit, compliance with an
7 effluent limitation for phosphorus equal to 0.6 milligrams per liter as a monthly
8 average.

9 3. In the 3rd permit for which the department includes the variance, a
10 requirement to achieve, by the end of the term of that permit, compliance with an
11 effluent limitation for phosphorus equal to 0.5 milligrams per liter as a monthly
12 average.

13 4. In the 4th permit for which the department includes the variance, a
14 requirement to achieve, by the end of the term of that permit, compliance with the
15 water quality based effluent limitation for phosphorus.

16 (am) If a permittee certifies that the point source cannot achieve compliance
17 with an interim limit in par. (a) 1., 2., or 3. without a major facility upgrade, the
18 department shall include in the permit a requirement to achieve compliance with the
19 highest achievable interim limit, except that the department may not include an
20 interim limit that is higher than the limit established under s. 283.11 (3) (am).

****NOTE: I used "highest achievable interim limit" because if the point source
cannot achieve the limit in par. (a) 1., there would not be a "last" achievable interim limit.
Please let me know if a different approach should be taken.

OK

21 (b) In the permit for a point source for which the department approves the
22 variance under this section, in addition to the requirements under par. (a) or (am)
23 or sub. (7), the department shall require the permittee to implement the permittee's

1 choice of the following measures to reduce the amount of phosphorus entering the
2 waters of the state:

3 1. Making payments to counties as provided in sub. (8).

4 2. Entering into a binding, written agreement with the department under
5 which the permittee constructs a project or implements a plan that is designed to
6 result in an annual reduction of phosphorus pollution from other sources in the basin
7 in which the point source is located, in an amount equal to the difference between the
8 annual amount of phosphorus discharged by the point source and the target value.

9 3. Entering into a binding written agreement, that is approved by the
10 department, with another person under which the person constructs a project or
11 implements a plan that is designed to result in an annual reduction of phosphorus
12 pollution from other sources in the basin in which the point source is located, in an
13 amount equal to the difference between the annual amount of phosphorus
14 discharged by the point source and the target value.

15 (7) MORE STRINGENT EFFLUENT LIMITATIONS. If the department of administration
16 determines under sub. (3) (c) 2. that it is appropriate to apply more stringent effluent
17 limitations than those in sub. (6) (a) to all point sources or to a category of point
18 sources, the department of natural resources shall include the more stringent
19 effluent limitations specified under sub. (3) (c) 2. in permits reissued, modified, or
20 revoked and reissued after that determination for all point sources or for the category
21 of point sources to which the more stringent effluent limitations apply.

22 (8) PAYMENTS TO COUNTIES. (a) 1. A permittee that chooses to make payments
23 for phosphorus reduction under sub. (6) (b) 1. shall make the payments to each
24 county that is participating in the program under this subsection and that has
25 territory within the basin in which the point source is located in proportion to the

1 amount of territory each county has within the basin. The permittee shall make a
2 total payment by March 1 of each calendar year in the amount equal to the per pound
3 amount under subd. 2. times the number of pounds by which the amount of
4 phosphorus discharged by the point source during the previous year exceeded the
5 point source's target value. *If there is no participating county within the basin, the department shall direct the permittee to make payments to participating counties selected by the department.*

****NOTE: What happens if no county in the basin participates? Should this option only be available if at least one county with territory in the basin participates? *This is highly unlikely but should be addressed per above.*

6 2. The per pound payment for this subsection is \$50 beginning on the effective
7 date of this subdivision [LRB inserts date]. Beginning in 2015, the department
8 shall adjust the per pound payment each year by a percentage equal to the average
9 annual percentage change in the U.S. consumer price index for all urban consumers,
10 U.S. city average, as determined by the federal department of labor, for the 12
11 months ending on the preceding December 31. The adjusted amount takes effect for
12 permits reissued on April 1. The per pound payment in effect when a permit is
13 reissued applies for the term of the permit.

14 (b) 1. A county shall use payments received under this subsection to provide
15 cost sharing under s. 281.16 (3) (e) or (4) for projects to reduce the amount of
16 phosphorus entering the waters of the state or for staff to implement projects to
17 reduce the amount of phosphorus entering the waters of the state from nonpoint
18 sources.

19 2. A county shall use at least 65 percent of the amounts received under this
20 subsection to provide cost sharing under s. 281.16 (3) (e) or (4). *To the maximum extent practicable*
21 cost sharing for projects in the county that *have the highest priority ranking or the*
22 *greatest potential to reduce the amount of phosphorus per acre*
~~the amount of phosphorus~~ entering the waters of the state.

****NOTE: It isn't clear to me whether the intent is to require counties to fund the biggest projects (without regard to cost per pound of reduction) or to fund the most cost-effective projects, regardless of the amount of reduction from each project (which

See if this is clearer

should result in getting the most reduction for the available money). In either event, I am unsure how counties or the department could identify all of the potential projects in order to tell that the "right" projects are being funded.

1 3. No later than May 1 of the year following a year in which a county receives
2 payments under this subsection, the county shall submit an annual report to the
3 department of natural resources, the department of administration, the department
4 of agriculture, trade and consumer protection, and each permittee from which it
5 received payments during the previous year. In the annual report, the county shall
6 describe the projects for which it provided cost sharing, quantify the associated
7 phosphorus reductions achieved using accepted modeling technology, and identify
8 any staff funded with the payments.

9 4. The department shall evaluate reports submitted under subd. 3. If the
10 department determines that a county is not using the payments to effectively reduce
11 the amount of phosphorus entering the waters of the state from nonpoint sources, the
12 department may require permittees who made the payments to eliminate or reduce
13 future payments to the county.

14 5. A county shall notify the department ^{by January 1, of each year} if it chooses not to participate in the
15 program under this subsection.

16 **SECTION 3.** 283.63 (1) (am) of the statutes is amended to read:

17 283.63 (1) (am) After a verified petition for review is filed and until the last day
18 for seeking review of the department's decision or a later date fixed by order of the
19 reviewing court, any term or condition, thermal effluent limitation or water quality
20 based effluent limitation which is the subject of the petition is not effective. All other
21 provisions of the permit continue in effect except those for which an application for
22 a variance has been submitted under s. 283.15 or 283.16. For those provisions for
23 which a petition for review has been submitted under this section, the corresponding

1 or similar provisions of the prior permit continue in effect until the last day for
2 seeking review of the department's final decision or a later date fixed by order of the
3 reviewing court.

4 **SECTION 4.** 283.63 (4) of the statutes is amended to read:

5 283.63 (4) Subsections (1) and (2) do not apply to the modification of a permit
6 which implements a decision under s. 283.15 or 283.16 or the denial of a request for
7 a variance under s. 283.15 or 283.16. A proceeding under subs. (1) and (2) shall not
8 be delayed pending completion of the review of a variance request under s. 283.15
9 or 283.16.

10 (END)